

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2034

To be Argued by:
STEVEN J. HYMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-2034

GEORGE KAPLAN,

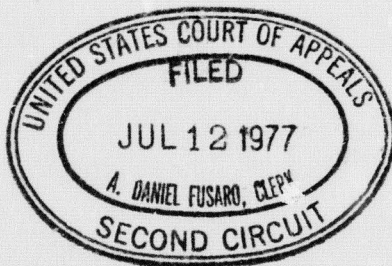
Petitioner-Appellant,

-against-

ROY BOMBARD, Superintendent,
Greenhaven Correctional Facility,

Respondent-Appellee.

BRIEF ON APPEAL



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Preliminary Statement

This is an appeal by petitioner from the order of the United States District Court by Goettel, J., denying appellant's petition for writ of habeas corpus pursuant to Title 28, U.S.C. §2254. A certificate of probable cause for appeal pursuant to Rule 22 of the Federal Rules of Appellate Procedure has been issued and notice of appeal filed. Appellant has been granted in forma pauperis status pursuant to Rule 24 of the Federal Rules of Appellate Procedure. Appellant seeks reversal of his conviction in New York State for arson in the second degree on the grounds that he was denied the effective assistance of counsel as

guaranteed him under the Sixth Amendment, as a result of conflict of interest on the part of his trial lawyer. Appellant has exhausted his state remedies, his conviction having been affirmed by the New York Court of Appeals at 38 N.Y. 2d 307, 379 N.Y.S. 2d 761, 1975.

No hearing was held by the District Court on the petition filed herein. The decision was based, therefore, entirely upon the petition for habeas corpus (A 17ff), ^{*}/ respondent's answering papers (A 28-29) and the trial record and new trial hearing held in the state court.

^{*}/ All "A" references will be to the appendix filed herein and all "R" references will be to the trial transcript and new trial hearing transcript, a complete copy of which is on file with the court.

Statement of Facts

Introduction

In July, 1973, appellant was indicted, along with two co-defendants, Jerry Gomberg and Martin Hodas on charges that the three individuals committed two acts of arson. The three individuals were tried together, all represented by Herbert Kassner, a New York attorney, and from time to time his law partner, Seymour Detsky.

As will be discussed in detail below, appellant and his co-defendants were accused of having committed arson by having hired, and thereafter instructed, employees of their business establishment to burn out a competing business. The major witnesses in the case against them were three employees, Christopher Hatton, Dexter Morton and Earl Jones ^{*}/ and the owner of a massage parlor, Nicholas Valentine.

Appellant submits that as a result of Kassner representing both himself and Hodas, a conflict of interest resulted that denied appellant the effective assistance of counsel. ^{**}/

^{*}/ It should be noted that these three individuals subsequent to trial recanted their testimony as to appellant's involvement in the case.

^{**}/ While appellant's trial counsel represented the three defendants, including appellant, in the arson case, he also represented the prosecution witnesses Morton and Jones. The New York State Supreme Court had to order appellant's trial counsel to cease their representation of these witnesses at the request of the District Attorney because there was "a manifest conflict of interest." (A 102-104).

The problems that caused the conflict had their roots at the very inception of the case, and as will be discussed below, were revealed to the trial court long before that court determined to take any action with regard to the potential conflict.

A. Pre-Trial

After appellant and his co-defendants were indicted, appellant's attorney filed two motions. The first motion was a request for discovery and bill of particulars on behalf of all three of the defendants, including appellant (A30ff). In that motion appellant's counsel stated as follows:

... it is important that we obtain this information [the bill of particulars] as rapidly as possible so that we may ascertain whether indeed there may even be a conflict in our representation of three defendants.

"At the present time we do not see a conflict. However, it may well develop as a result of our obtaining the bill of particulars demanded herein that a conflict may develop and we may well be compelled to have either all or any one of the defendants hire another counsel. (A 50)

In October, 1973, appellant's counsel made his second motion but this time it was solely on behalf of appellant's co-defendant Martin Hodas (A54ff). This motion requested inspection of Grand Jury minutes, dismissal of the indictment and, in the alternative, a severance of defendant Hodas' case from that of appellant and the third defendant. This motion contained the following

statements by appellant's counsel in a sworn affidavit:

... permitting and authorizing an inspection of the Grand Jury minutes relating only to the Defendant, Martin Hodas and upon such inspection ... that this Court enter an Order declaring that the evidence submitted to the Grand Jury was legally insufficient to support an indictment against the Defendant, Martin Hodas, and for an Order dismissing the said indictment only insofar as Martin Hodas is concerned, and severing the action herein so that the action continues only against George Kaplan and Jerry Gomberg or, in the alternative, directing that separate trials be accorded to Defendants Gomberg, Kaplan and Hodas ...

(A54-55)

He further stated:

The sole reason that Martin Hodas was indicted with the defendants Kaplan and Gomberg is because of an alleged association he has had with them over the past years.

(A 58)

Appellant's counsel further stated that "... Hodas could not possibly have had any motivation remotely or otherwise to participate in any crime" (A 57). In addition, Detsky also proclaimed Hodas' innocence as well (A 57). At the trial, this idea would be expressed in testimony by Hodas/^(A 129-192)and by his bookkeeper, Levin, (A 113-128) that he was merely the "landlord" of the premises where Gomberg and Kaplan ran their massage parlors, that they were the "tenants", and that as such they, not Hodas, had a motive to burn down competitors. Appellant's own counsel, Mr. Kassner, took the stand and testified to it as well (A95-113) and argued it before the jury while cross examining (See testimony, C. Hatton, A 71-90).

Appellant's counsel then made the following statement in support of Hodas' request for severance from appellant.

We submit that the evidence against Kaplan and Gomberg may be such as to prejudice the defendant, Martin Hodas. That there is no reason why Martin Hodas should be tried together with Kaplan and Gomberg in any way whatsoever. The testimony that may be given against Kaplan or Gomberg will seriously prejudice Hodas to the extent that he will not receive a fair trial. Moreover, ... the testimony of Hodas may be so substantially different than the testimony of Kaplan and Gomberg that any testimony he may give may substantially prejudice Kaplan and Gomberg.

(A 58)

The Kassner and Detsky motion was denied by Justice Sutton. Notwithstanding that appellant's own attorney had raised questions of conflict of interest and had indicated that the defenses of Hodas and appellant would "seriously prejudice" either of the defendants so they would not receive a fair trial, there was no inquiry by the Court until the actual date of trial when Justice Denzer brought up the subject. At the numerous calendar calls and motion dates, no effort was ever made by any judge of the Court to determine the possible scope of conflict that could exist, whether the appellant understood it, and whether he wanted to waive his rights with regard to it.

B. Trial

1. Inquiry by Court. On the day the trial began (two months after the above referred to motion) the conflict problem was raised by the trial judge for the first time. On the morning of December 12, 1973, the day set for trial, the three defendants were in court with Detsky (A 63). Before any other proceedings had begun, Judge Denzer stated that he wished to speak to the defendants and he observed that they were "all represented by the same counsel, Mr. Detsky" (A 63). Detsky corrected the Court, stating that the firm represented the three defendants and that Kassner would select the jury and try the case (A 63). Then Judge Denzer inquired about whether the defendants were satisfied with Kassner, because, said the Judge, "I want to make certain at this point, that you don't regard your defense as being in conflict or that there might be a conflict of interest with respect to any attorney that represents all three of you." Although Hodas quickly assented to Kassner's representing him, Gomberg was not so sure and asked "[c]an I consult with my lawyer?" (A 63) After Gomberg consulted with Detsky, Detsky told the court that Gomberg did not understand the meaning of what Judge Denzer had just said, so the Judge elaborated:

I just want to make certain that in your mind there is no reason why one attorney should represent all three of you; that the attorney won't be put in a position of having to take a course of action which is favorable to one, but not to another. I just want to make sure you don't feel that way. Apparently you don't if you retained the same attorney; do you understand?

(A 63-64)

Even if the Judge had failed to read counsel's affidavit referred to previously, the response of Gomberg was a clear indication of the existence of a problem:

I understand that, but I was thinking, maybe it is better for us to get another lawyer. To have three of us

(A 64)

In response to Gomberg's apparent concern, Judge Denzer came back to the conflict:

The Court: Is there any conflict that you can think of between you and any of the other defendants?

Mr. Gomberg: I think maybe another lawyer might be helpful to us.

The Court: In addition to Mr. Kassner?

Mr. Gomberg: Yes.

The Court: You don't want to be represented by Mr. Kassner?

Mr. Gomberg: I would like to talk it over with another lawyer.

(A 64)

At that point the prosecution became involved, with Assistant District Attorney Kavanaugh implying that Gomberg's

concern about a possible conflict, which had first been called to Gomberg's attention by the Court, was merely a ploy to obtain an adjournment of the trial (A 64).

However, Judge Denzer pursued the conflict point, asking Detsky: "[d]id anybody ever indicate that there might be a conflict and ask for another attorney?" (A 65). Detsky's answer was in the negative, but he did allude to his earlier October 5, 1973 motion on behalf of Hodas (A 65). Despite Detsky's answer, Judge Denzer pressed his question:

The Court: At that time or any other time, did you [Detsky] ever suggest to any of the defendants that they retain another attorney because of any conflict? (A 66)

Mr. Detsky: Four or five days ago, I suggested to Mr. Hodas that there might be a conflict and either another or the other two should get themselves another lawyer. Mr. Hodas, Mr. Kaplan and Mr. Gomberg said they had confidence in our firm to handle it. But I do want this Court to understand that it was discussed in our office and I felt one of the three should get another counselor.

The Court: The way the situation stands is that you advised them of this and they told you they didn't want to hire other counsel?

Mr. Detsky: That's correct.

[Emphasis added] (A 66) ^{*/}

^{*/} It should be noted that in his affidavit in support of the motion for a new trial, Kaplan disputed Detsky's version of the office discussion a week earlier and denied ever having been apprised of the conflict of interest that was brewing. (A 197-200) Of course, most important is that Judge Denzer never asked appellant if Detsky's statement was correct or if he understood what was meant by conflict of interest.

There then followed the quoting by the Assistant District Attorney and Detsky of portions of Mr. Detsky's affidavit on his October 5, 1973 motion for Hodas, with Detsky concluding by stating that "I don't want Your Honor to think it [the possible conflict] has not bothered me " (A 67).

The Assistant District Attorney then asked the court to put certain questions to Detsky and depending on what the answer would be, in the Assistant District Attorney's judgment, "there is a real question as to whether [Detsky's] conduct has been proper and probably, the matter should be referred to the Bar Association" (A.68). Instead of pursuing the matter further, the court then sought to terminate further consideration of the matter:

The Court: I think I am going to cut this discussion short. We will proceed with the trial. If any of the defendants wish, either today or any other day, to bring in other counsel in the case, they are at liberty to do so. If any defendant feels at some point that there is a conflict of that nature, he may have other counsel.

(A 68)

However, the Assistant District Attorney wanted clarification of the question by counsel. He stated to the court:

Would you ask Mr. Detsky if he feels there is a conflict? I would like to know now, so it is clear on the record. (A 68)

The following colloquy then ensued:

The Court: Do you feel there is a conflict, Mr. Detsky? (A 68)

Mr. Detsky: If Your Honor please, right now, I don't feel there is one and I have said that in my affidavit. However, my concern is, and I have manifested this concern in the motion that I made or I wouldn't have made that motion, that I wanted to be really sure. No attorney can be sure when he is representing three defendants.

There may be a conflict. The United States Circuit Court of Appeals in the New York Law Journal said that the lawyer wasn't aware that there was a conflict until one of the defendants blurted out something during the course of the trial. (A 69)

The Court: I will repeat what I said. If it happens that any of the defendants think that another attorney should be brought in, you are at liberty to do so. I think that no other counsel are probably familiar with this case. I don't intend to have any adjournment here, any abatement of the trial for that purpose. You are aware of it now and you can be thinking of the matter and if something does arise, I will be happy to have other counsel enter the case in the course of the trial (A 69).

Mr. Detsky: I will just say one thing: it might be wise to adjourn to your chambers and discuss this with Assistant District Attorney Kavanaugh privately. If, in his opinion, there may be a conflict, he shall enlighten the Court. I can make an intelligent (A 69)

When the Assistant District Attorney stated instantly that, in his opinion there was no conflict of interest, Judge Denzer said: Let's call the panel in" (A 70).

The record is barren of any statement by the Court whatsoever to appellant Kaplan as to whether he understood the meaning of a conflict of interest and whether, after having it explained to him, he desired different counsel. It is equally

barren of any statement by appellant. It is apparent, as the District Court found, that as a result of the answer Judge Denzer received from Mr. Gomberg, he saw that nothing would be gained from making the same inquiry of Mr. Kaplan and it might delay the trial (A 9). Appellant was then ordered to trial with Kassner as his attorney.

The People maintained throughout the trial that the three defendants all were partners in a massage parlor called the Geisha House and that they were upset at the undercutting of prices by other massage parlors. It was the People's theory that three employees of the Geisha House, Morton, Hatton and Jones, were paid by the three defendants to burn down the Palace and Studio massage parlors in order to convince those competing parlors to raise their prices or drive them completely out of business. The accomplice witnesses, as well as Valentine, testified on direct examination as to the common interest and scheme of the defendants. The prosecution thus presented a unitary approach as to all three defendants.

The defense, however, presented no such unity of purpose. One defendant, Martin Hodas, sought to show that he had no interest in the Geisha House massage parlor since he was only a landlord collecting rent from the true owners, Kaplan and Gomberg. The basic thrust of his argument to the jury was that as only the landlord he had no motive or interest to drive competing massage parlors out of business. He was only a disinterested businessman being set upon by the police. His attorney vigorously cross-examined witnesses for the

prosecution to attempt to show that he had no interest in the Geisha House and did not employ Hatton, Jones or Morton.^{*/} In further support of his defense, his attorney called him to the stand where he testified, inter alia, as to his non-involvement in the Geisha House, specifically stating that appellant, along with Gomberg, were the true owners.^{**/} He further testified to his non-interest in the prices charged by other massage parlors. To support his position further, his attorney also called as a witness Hodas' bookkeeper, one Levin, who fully supported the testimony of Hodas' claimed relationship to appellant and appellant's relationship to the Geisha House as one of the true owners of it.^{***/}

The defense offered on behalf of appellant was that the prosecution witnesses were lying. Appellant's involvement in the massage parlor, including his economic interest in its success, his alleged employment of the actual arsonists and his motive to remove the competition were all items conceded by appellant's counsel.

Appellant was not called to take the stand. Appellant had no significant criminal record, there being only one conviction for a misdemeanor on his record at that time. Appellant in his new trial motion and affidavit stated that he was not called to the stand because his testimony was in conflict with that of the co-defendant Hodas as to Hodas' involvement in the

^{*/} See testimony of Hatton (A 71-90) and Morton (A 91-94).

^{**/} See testimony of Martin Hodas (A 129-192)

^{***/} See testimony H. Levin (A113-128). See also appellant's counsel's own testimony when he took the stand (A95-113)

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massage parlor (A 198). A witness named Jerome Bayarsky would have testified that appellant did not give a prosecution witness an airplane ticket as payment for committing arson (A205-230). This witness was not called by appellant's counsel. His testimony, while helpful to appellant, would have conflicted with that of Hodas as to Hodas' economic involvement in the massage parlor (A212).

In addition, other problems arose caused by the conflict between the Hodas defense and that of appellant. No attorney was available to cross-examine the witnesses put on the stand in behalf of Hodas, who contended that appellant and his co-defendant were the owners of the massage parlor at issue and the employers of the alleged arsonists. The defendant Hodas, himself, throughout his testimony, emphasized appellant's involvement in the massage parlor and his motive to commit the crime (A129-192). During summation appellant's counsel argued no motive on behalf of Hodas emphasizing that he did not have "any conceivable reason, any interest in the massage parlor or any conceivable reason to do any damage to anybody on that block ... because he had no interest" (A 243).

At the conclusion of the case appellant was convicted of the arson charges and defendant Hodas was acquitted of all charges.

C. Post Trial Proceedings

Following appellant's conviction he retained new counsel, the firm representing appellant in the present case. At the same time, the co-defendant Gomberg also retained new counsel and thus for the first time the firm of Kassner and Detsky was no longer involved in the proceeding.

On February 14, 1974, appellant filed a notice of motion and affidavits to set aside his conviction (A 193-204). Part of the grounds for the new trial proceeding was that appellant was denied the effective assistance of counsel and due process of law as a result of conflict of interest on the part of defense counsel (A196-204). In appellant's affidavit he stated that he was never advised of the conflicting defenses that would emerge at trial (A197), that only the defendant Hodas was going to take the stand (A 198), that a defense witness favorable to appellant would not be called (A 198-99), that he would not be permitted to take the stand in his own defense (A198-199), or that there was any possible conflict which appellant should be aware of (A 197). As a result of this affidavit an evidentiary hearing was held. During the course of this proceeding the major witnesses against appellant recanted their trial testimony (R. Vol VI of Record).

At no time during the new trial proceedings was any evidence introduced to substantiate that defendant was "an intelligent and perceptive businessman".

nor was any evidence introduced that in any way added to the record as to the question of waiver of the right to effective counsel.

The hearing also revealed that at least one witness, a Jerome Bayarsky, was advised that he was not called to testify because his testimony would conflict with that of Martin Hodas (A 205-230) Bayarsky indicated that he would have testified that appellant and his co-defendant did not pay one of the accomplices with an airline ticket as alleged by the prosecution, but at the same time would also have testified that the defendant, Hodas, acted in a role far greater than that of mere landlord.

The trial court ultimately denied appellant's motion for a new trial and on April 19, 1974, sentenced appellant to seven years on each of the counts, to be served concurrently. An appeal was duly entered and taken to the Appellate Division, First Department, in the Supreme Court of the State of New York, where conviction was affirmed with no opinion. At the Appellate Division appellant was represented by the office now representing appellant in this action, and co-defendant Gomberg was represented by Professor Henry Holzer. Thereafter the defendant Gomberg apparently terminated the employment of Professor Holzer and again sought the counsel of the firm of Kassner and Detsky, specifically, Herbert Kassner. This was without the consent of

appellant. The re-entry of the firm of Kassner and Detsky into the appeal of appellant's conviction only to the extent of representing a co-defendant, severely prejudiced fair consideration of appellant's appeal. The reappearance of this firm into a case in which the major issue raised by appellant was whether or not there was a conflict of interest by these attorneys at the trial below had significant adverse impact on fair consideration of appellant's appeal. However, such action by appellant's trial counsel on the appeal is clear evidence in this Court that these attorneys suffered, at the very least, an extreme insensitivity to the question of conflict of interest. As will be argued below, it is submitted that this insensitivity was exhibited at the very outset of this case and throughout the trial of the action.

After affirmance of his conviction with the New York Court of Appeals, appellant brought this action to set aside his conviction on the grounds that this conflict of interest deprived him of the effective assistance of counsel and a fair trial as guaranteed him under the Constitution of the United States.

Questions Presented

1. Whether a defendant in a criminal trial who is represented by an attorney also representing co-defendants can be held to have knowingly and intelligently waived his right to the effective assistance of counsel when the trial court had notice of the existence of a potential conflict of interest and did not personally interrogate defendant on the record or otherwise inquire of the defendant whether he understood the meaning of conflict of interest and whether he wanted to proceed to trial with potentially impaired counsel.

2. Whether a defendant suffers from his attorney's conflict of interest at a criminal trial when,

(a) the defendant was not called to testify in his own defense and his testimony would have been in conflict with that of the co-defendant represented by the same attorney;

(b) a witness was not called to testify for the defendant and that witness' testimony would have been in conflict with the testimony of a co-defendant represented by the same attorney; and

(c) the defense of the co-defendant represented by the same attorney reinforced the state's case against the defendant by emphasizing his motive and opportunity to commit the crime.

3. Whether the District Court erred in not granting the defendant a hearing on a habeas corpus petition to determine whether a defendant was an "intelligent and perceptive businessman" when the record is silent as to the existence of such fact and the defendant alleged in his petition that he did not have education beyond the sixth grade and where such determination resulted in a finding of knowing and intelligent waiver of a fundamental constitutional right.

Statement of Law

It is recognized that the right of counsel guaranteed under the Sixth and Fourteenth Amendments carries with it the right to the effective assistance of counsel who is not fettered or impaired by conflict of interests. As this Court has recently stated:

We have repeatedly held ... that representation free from conflict of interests is an essential part of the Sixth Amendment right to the effective assistance of counsel."

United States v. Bernstein, 533 F.2d 775
(2d Cir. 1976)

See, also, United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976) and Abraham v. United States, 549 F. 2d 236 (2d Cir. 1977).

This constitutional guarantee applies with equal force to state court proceedings since it involves fundamental constitutional rights. See United States ex rel Hart v. Davenport, 478 F.2d 203 (3rd Cir. 1973). See also Alvarez v. Wainwright, 522 F.2d 100 (5th Cir. 1975); Austin v. Erickson, 477 F. 2d 620 (8th Cir. 1973) and Oshen v. McMann, 378 F.2d 993 (2d Cir. 1973).

The rule in this Circuit with regard to conflict of interest has been set down in the two recent cases of United States v. Carrigan, *supra*, and Abraham v. United States, *supra*. First there must be inquiry by a trial judge of a defendant where a potential conflict of interest exists. As this Court has stated:

We have said that the defendant should be fully apprised by the trial court of the facts underlying the potential conflict and the defendant should be given the opportunity to express his views.

Abraham v. United States, supra, at p. 239

While the rule in this Circuit has been stated to be that there must be some conflict of interest and some specific instance of prejudice arising from the joint representation before a conviction would be reversed, the extent of the inquiry by the trial court will determine the burden that the defendant is expected to meet. Where the inquiry is sufficient to establish a knowing and intelligent waiver by the defendant, then he must meet the burden of establishing prejudice. See Abraham v. United States, supra, at p. 239. However, where proper inquiry has not been conducted, this Court has stated that the burden upon the defendant shifts and it is the burden of the prosecution to establish lack of prejudice. United States v. Carrigan, supra, at p. 1056 and United States v. DeBerry, 487 F. 2d 453 (2d Cir. 1973).

As will be argued below, appellant submits that the trial court did not properly interrogate him or otherwise ensure that he understood the risks of being represented by potentially impaired counsel and that as a result he could not have knowingly and intelligently waived his Sixth Amendment right. Further,

appellant has shown that a conflict of interest existed and the record does not establish lack of prejudice thereby. As a result, appellant was denied, in the trial of this action, the effective assistance of counsel.

It will also be argued below that the District Court, in determining that appellant knowingly and intelligently waived his right to the effective assistance of counsel, erred in not granting him a full hearing to determine the facts material to such a finding. The District Court opinion relies in part on the finding that appellant was an "intelligent and perceptive businessman" (A 10). Yet the record is barren to support such a finding. Further, there is substantial question as to whether appellant was advised at all by his counsel as to the existence of conflict of interest, whether he understood it and whether he desired to continue notwithstanding it. These issues, it is submitted, should have been determined at a full hearing in the District Court.

POINT I

APPELLANT DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. The Trial Court Did Not Conduct a Proper Inquiry.

The trial court in this case failed to conduct an adequate inquiry of appellant in order to ensure that he was knowingly and intelligently electing to proceed with potentially impaired counsel. The record is barren of any response by appellant as to his understanding of the problems and whether he desired to proceed to trial with Mr. Kassner and his partner.

While the trial court did initiate an inquiry, it unfortunately failed to follow through with it to the extent required by law and to the extent necessary to ensure a knowing and intelligent waiver by appellant of his constitutional rights. The record indicates that in August and October of 1973 motion papers submitted by appellant's counsel raised the very spectre of a possible conflict of interest (A 54-61), yet no inquiry was conducted or initiated by any court at that time. Only on the very day of trial in December 1973 did the trial court for the first time raise the issue with the three defendants and when it did so and received answers not consistent with an

immediate trial, the inquiry was abruptly terminated notwithstanding the clear warnings that substantial problems existed and notwithstanding appellant's counsel's own request to have an in camera conference on the matter.

The request by a co-defendant to consult with another lawyer was itself sufficient to warrant personal interrogation of appellant to determine his understanding of the situation. Instead, the trial court ignored appellant and sought to obviate the need for further inquiry by directing his questions to : counsel (A 65) leaving the question open to be solved at some future time by appellant choosing to bring in another lawyer (A 68). This, however, was not sufficient to overcome the failure to obtain appellant's oral responses on the record. It is submitted that the fact that appellant might have responded to the court's questioning by requesting another lawyer and thereby delayed the trial is not sufficient reason in law to justify not questioning appellant and forcing him to trial with impaired counsel. The trial court had adequate opportunity to have broached the subject at an earlier date and thus could have obviated the problem long before trial was to begin, or in the alternative, could have questioned appellant in sufficient depth to determine whether or not his position was a ploy or was warranted, under the circumstances. Instead, however, this Court is now faced with a silent record.

The rule in this Circuit is now clear that the trial court must conduct a personal inquiry of each defendant and obtain from him, on the record, his responses. The rule in this Circuit has been stated as follows:

The law in this Circuit is clear. When a potential conflict of interest arises, either where a court has assigned the same counsel to represent several defendants or where the same counsel has been retained by co-defendants in a criminal case, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. The defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views.
[cites omitted]

In fact, a review of the leading Second Circuit cases indicates that the trial court is under an obligation to obtain the personal responses of the defendant in order to satisfy the rule. In United States v. Mari, 526 F. 2d 117 (2d Cir. 1975), it was noted that the law requires that:

"[T]he trial judge conduct a careful inquiry including a personal interrogation of the defendant to satisfy himself that no conflict exists and that the parties had no objection to joint representation.

(at p. 119)

So, too, in United States v. DeBerry, supra, this Court in fact set aside a conviction because there was no personal inquiry of the defendant. While the District Court had inquired of

counsel, the Second Circuit noted:

[T]his is quite another thing, however, from the court's interrogating the individual defendants, themselves.

(at p. 453)

Where this Court has found waiver, it has done so where there was actual questioning of the defendant on the record. Thus in Abraham v. United States, supra, the Circuit affirmed that defendant had made a knowing election to proceed with counsel because:

Judge Bryan, not satisfied by counsel's assurances alone, conducted a thorough examination of each defendant on the record in which he explained the seriousness of the charges, the possibility at trial that 'the best protection of your interests may be different than the protection of one or more of your co-defendants who is represented by the same counsel' [fn. omitted] and the right of each to separate counsel. Judge Bryan required each defendant to rise, address the court personally and assure the judge that he understood what was being said.

(Supra, at pp. 238-239)

In United States v. Scheiner, 410 F. 2d 337 (2d Cir. 1969), the Court held that Scheiner waived his rights to complain because:

The court was scrupulous in alerting Scheiner and his counsel to the dangers of conflict of interest and in specifically ascertaining that Scheiner had discussed the question with counsel, considered it and desired to proceed.

(at p. 340)

So, too, in United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973) the court found waiver after:

... repeated searching inquiries by the courts ... followed by statements both by defendants' counsel and by defendants themselves that no such conflict existed

(at p. 284)

and again in United States v. Vowter, 500 F. 2d 1210, (2d Cir. 1974), waiver was deemed sufficient where:

[T]he matter was carefully examined by the trial judge prior to trial on two separate occasions and both appellants as well as their attorney uniformly expressed their desire for joint representation by single counsel.

(at p. 1211)

The case of United States v. Arredo-Sarmiento, 524 F.2d 591 (2d Cir. 1975) is instructive also on what this Circuit regards as sufficient inquiry in order to find waiver of the right to effective counsel. In that case the Circuit reversed a District Court order removing counsel because of a conflict of interest ^{*}/ and provided a basis upon which the right to effective counsel could be waived.

^{*}/ It is interesting to note that the firm that was removed from representation of the defendants in the Arredo-Sarmiento case was Kassner and Detsky, the same attorneys who were trial counsel in the case at bar. It would appear that Messrs. Kassner and Detsky are prone to be making much law with regard to the issue of conflict of interest of attorneys in multiple defendant trials.

The inquiry required in Armedo-Sarmiento was not followed in the case at bar. See United States v. Bernstein, *supra*, where this Court sanctioned a searching inquiry by the District Court of the defendant to determine if the waiver was a knowing and intelligent one. See, also, United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), relied on by this Court in Armedo-Sarmiento, where the Court set forth the specific narrative response required from a defendant in order for him to waive his right to have counsel free from conflict.

In view of the case law it is submitted that the absence of the trial court's inquiry of appellant as to his understanding of the possible conflict of interest and his desire to proceed with counsel notwithstanding it, was contrary to the law. Appellant was neither properly alerted nor properly interrogated on the record to justify a finding that he knowingly and intelligently elected to proceed to trial with impaired counsel.

B. Appellant's Silence Cannot be Construed as a Waiver of his Right to Counsel.

Appellant's silence on the record as to whether he understood the problems posed by the potential conflict of interest and his desire to proceed with impaired counsel precludes a finding by the court that he knowingly and intelligently waived his rights. To construe the record in this case to be sufficient for appellant to have waived his right to effective assistance of counsel is contrary to the Supreme Court's pronouncements in Glasser v. United States, 315 U.S. 60 and Johnson v. Zerbst, 304 U.S. 458, the seminal cases on the subject. As the Supreme Court noted, where waiver of fundamental rights is involved "we indulge every reasonable presumption against the waiver of fundamental rights." Glasser, supra, at p. 70.

Recently, in Schneckloth v. Bustamonte, 412 U.S. 218, the Supreme Court held that in order to find a waiver of fundamental rights the government must meet "an appropriately heavy burden" before an intentional relinquishment of a known right would be sustained" (at p. 236-237). The silent record in this case cannot meet the "heavy burden" formula set down by the Supreme Court. Appellant's silence cannot be construed as an acquiescence sufficient to warrant his intentional relinquishment of the right to effective assistance of counsel. Nor does the record support a finding that he was a sufficiently intelligent and perceptive

individual in matters of law to infer his understanding of what his rights and alternatives were. */ In Glasser v. United States, supra, the Court found that even an experienced attorney should not be construed to having "tacitly acquiesced" to waiving his fundamental right to the effective assistance of counsel. As the Court stated:

Under these circumstances, to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart [Glasser's attorney] is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duties to preserve the fundamental rights of an accused."

(Glasser, supra, at p. 72)

So, too, in United States v. Harrison, 451 F.2d 1013 (2d Cir. 1971), this Circuit also held that a knowing and intelligent waiver by an attorney was insufficient without proper advice and interrogation on the record.

If Glasser and Harrison, both attorneys, could not be held to have tacitly acquiesced to waiving their fundamental rights, then to find such against appellant, whatever his business experience, is a distortion of law and justice.

*/ It must be emphasized that while the District Court alludes to appellant being an "intelligent and perceptive businessman", the record is barren of any support of such an inference. In his petition of habeas corpus appellant alleges that he had only a sixth grade education, having been a former boxer and bouncer (A 21). (See also sentencing minutes, A231 to 241).

While one may seek to distinguish the "circumstances" in Glasser from the circumstances in appellant's case it is submitted that such an argument only further reinforces appellant's position that he could not be deemed to have waived his fundamental rights. The trial record shows confusion, angry colloquy between counsel and the court, threats of Bar Association action, equivocation on the part of appellant's counsel and the request of one of the co-defendants to talk to another lawyer and being denied by the court. Such circumstances are far from conducive to finding tacit acquiescence to the waiver of the most fundamental rights.

C. Appellant's Trial Counsel Cannot be Deemed to have Waived his Right to the Effective Assistance of Counsel.

Appellant's right to the effective assistance of counsel cannot be waived in the circumstances of this case by the equivocal statements of his trial counsel. This is particularly so where, as the District Court found, appellant's trial counsel "did not demonstrate a high degree of concern for the ethics of the profession." (A 16)

The District Court reliance on United States v. Armone, 363 F.2d 385 (2d Cir. 1966) as support for holding that appellant's counsel waived his right to the effective assistance of counsel is incorrect. Both the circumstances of this case and the holding by the District Court that appellant's counsel "did not demonstrate

a high degree of concern for the ethics of the profession" distinguishes this case from Armone. In fact, there is no case to support extension of the Armone doctrine to the case at bar. ^{*/}
In Armone the Circuit Court held that counsel's statement that there was no conflict of interest may be relied upon by the court "absent unusual circumstances". See Armone, supra, at p. 406. However, in the case at bar there are sufficient unusual circumstances that preclude reliance on counsel's statements to waive appellant's rights.

The circumstances in this case that warrant finding "unusual circumstances" can best be set forth seriatim:

(1) appellant's trial counsel filed motions in this case that indicated the possibility of conflict of interest and, in fact, moved for a severance because of it (A 54-61).

(2) the co-defendant, Gomberg, requested the opportunity to consult with another lawyer which was rejected by the court (A 63-64).

^{*/} The New York Court of Appeals in its decision in this case cited United States v. Wisniewski, supra, to support the holding that a lawyer's representation is sufficient to waive a defendant's right to the effective assistance of counsel. However, a review of Wisniewski indicates that the defendants, themselves, were actually questioned. So, too, in United States v. Scheiner, supra, which also may be relied on for the same proposition, the defendant involved was actually questioned by the court. Of course in neither of these two cases was there any question as to the standards of ethics or competency of counsel.

(3) The District Attorney threatened to take trial counsel to the Bar Association if he admitted to the existence of a conflict (A 68).

(4) Trial counsel asked for an in camera discussion to explore the possibility of conflicts of interest, which request was denied (A 69).

(5) There is no clear, unambiguous statement by counsel that appellant understood the meaning of conflict of interest and agreed to proceed to trial with trial counsel notwithstanding such risks.

(6) The firm of Kassner and Detsky was then and continued to be insensitive to the existence of a conflict of interest. The firm had to be ordered off the case of prosecution witnesses and also reappeared on the appeal in state court after the question of conflict of interest had been raised by new counsel.

(7) The atmosphere, when the court inquired as to the problem of conflict of interest, became so charged, inflamed and confused by argument and interruption that appellant's silence could not be determinative that he was acquiescing in what his attorney was saying or that he had a reasonable opportunity to object.

The existence of these factors distinguishes this case from Armone and brings it, it is submitted, in line with the rules set down in United States v. DeBerry. In DeBerry this Court refused to abide by counsel's representations and required personal

interrogation of the defendant before waiver could be found. Such a view, it is submitted, is equally applicable to the case at bar.

Appellant did not knowingly and intelligently waive his right to the effective assistance of counsel and his attorney could not and did not effectively waive those rights for him.

POINT II

THE JOINT REPRESENTATION OF APPELLANT AND A CO-DEFENDANT BY THE SAME ATTORNEY CREATED A CONFLICT OF INTEREST

Appellant was denied the effective assistance of counsel at the trial of this action because his attorney represented a co-defendant, Martin Hodas, as well, and as a result of such joint representation an actual conflict of interest arose.

The standard by which conflict of interest is to be evaluated in this Circuit is determined in part by the extent of the inquiry conducted by the trial court apprising the defendant of the risks and determining his willingness to proceed to trial with potentially impaired counsel. Where the inquiry has been sufficient, then the burden is entirely on the defendant to show the specific instance of prejudice arising from the conflict of interest. See United States v. Lovano, 420 F.2d 769, 773 (2d Cir. 1970) and United

States v. Wisniewski, supra. Where, however, the inquiry has been insufficient, then the burden is on the prosecution "to establish lack of prejudice." See United States v. Carrigan, supra, at p.1056 and United States v. DeBerry, supra, at p. 453-454. In considering this standard it must also be borne in mind that the court need not determine "the precise degree of prejudice" for the Supreme Court has held that "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, supra, at p.76.

It is with these rules in mind that the record in this case must be evaluated. It is submitted that the record does not demonstrate a lack of prejudice from the conflict of interest that arose because of the representation by Kassner and Detsky of both appellant and Hodas. The individual defenses of appellant and his co-defendant were in conflict with each other on numerous occasions and decisions were made with regard to the conduct of the trial that were solely for the benefit of Hodas and to the detriment of appellant.

The conflict that existed arose because of the divergent defenses put forth by Mr. Kassner for the defendant Hodas on one hand and appellant on the other. The theory of the prosecution was that the three accomplice witnesses set fire to two massage parlors at the behest of appellant and the other two co-defendants.

The prosecution sought to prove the involvement of the defendants by showing that they were partners in a massage parlor, that they employed the three accomplice witnesses who did the actual burning and that the motive for the arson was to drive out competing establishments. Each of the defendants was claimed by the People to have equal motive to order the arson because of their joint relationship as employers of the accomplices and partners in the massage parlor. It was thus critical for the People to prove to the jury that each of the three defendants was a partner in the massage parlor, they were employers of the three accomplice witnesses and had a motive to burn down the competition.

In response to this theory of the prosecution, the defense became divided between appellant and his co-defendant Gomberg, on the one hand, and Hodas on the other. While all three defendants had a common interest in attacking the credibility of the prosecution witnesses, the affirmative defense of Hodas only reinforced the prosecution's allegations as to appellant. The main thrust of the Hodas defense was that he was only the landlord of appellant and as such had no motive or interest in competing massage parlors. In essence, his defense was one calculated to convince the jury of his non-involvement as a partner or as an employer of the accomplice witnesses. His defense was based upon his lack of motive. As Mr. Kassner said when he was cross-examining Hatton, an accomplice witness:

* * * * *

This is an indication to the witnesses who heard this made by Hodas that Hodas is not a partner and has no interest in the Geisha House.

The Court: So what.

Mr. Kassner: So what?

The Court: What is the significance of that?

Mr. Kassner: Then why would he participate in making a fire? Why would he participate if he has no interest in the place?

* * * * *

Mr. Kassner: Yes, Your Honor, what possible interest does he have in making the fire if he has no interest in the place?

(A 87-88)

The same argument runs consistently through cross-examination of all the witnesses, the direct testimony of the sole defense witnesses and in Mr. Kassner's summation.

The impact of this theory of Mr. Hodas on appellant's case cannot be underrated. Each time Mr. Hodas sought to show his lack of motive he only emphasized to the jury the plausibility of the People's allegations as to the motive of appellant. Each time Hodas emphasized that he was only a landlord collecting rent from appellant it reinforced to the jury that appellant was, apparently, as alleged by the prosecution, a partner in a massage parlor, the employer of the accomplice witnesses and a person who

had a very real motive to burn the competition. It is this divergence in defenses that caused the conflict of interest.

The manifestations of the conflict of interest are apparent throughout the transcript and are set forth in detail in the statement of facts. The emphasis in cross-examination of witnesses, the failure to object to leading questions of Valentine, the sole corroborating witness, the calling of Hodas and Levin as defense witnesses, the failure to call appellant, the co-defendant Gomberg and a witness, Jerome Bayarsky, the summation and the charge requested by trial counsel are each small bricks in the ultimate wall that separated Hodas from appellant.

The refusal to call appellant as a witness, although he desired it, and the refusal to call Jerome Bayarsky as a witness was very possibly motivated by trial counsel's wish not to risk testimony that in any way might conflict with Hodas' claim of non-involvement and his status as a landlord. Appellant, in his affidavit submitted in support of the new trial motion, (A193ff) and Bayarsky, at the hearing, (A205ff) both indicated that had they taken the stand their testimony as to Hodas' relationship in the massage parlor would have been at odds with the Hodas position as stated to the jury.

The existence of these conflicting theories of defense did not develop suddenly midway in the trial. Rather, a reading of the complete record here indicates that defense counsel was

aware of the situation prior to trial. Thus Mr. Detsky, in his own affidavit in support of a motion to sever, set forth the very basis for the conflict that was to emerge at trial. Mr. Detsky moved on behalf of Mr. Hodas, only, for a severance of Hodas' case from that of appellant. The Detsky affidavit indicates the ultimate defense Hodas was to take at trial, that he was indicted solely because of his association with appellant (A that Hodas had no motivation to commit the crime because he was not an owner of a massage parlor (A 57) and that Hodas would be prejudiced by being tried with appellant (A 58).

A careful reading of the New York Court of Appeals opinion in appellant's case indicates that the existence of conflict of interest was, in fact, recognized by this Court. The Court recognized that Hodas presented a defense that he had no motive to set fire to the competing massage parlors and noted "this defense proved to be successful as Hodas was acquitted, while the other defendants, appellants herein, were found guilty of two counts of arson in the second degree." 379 N.Y.S. 2d 769,772. Then again the Court further noted appellant's assertion that Hodas' defense of "lack of economic incentive to commit the crimes charged worked to shift all of the blame on the two remaining defendants and reinforced the prosecution's argument that the owners of the Geisha House would have the motive and opportunity to perpetrate an arson" (*id.* at p. 773). The

Court does not dispute appellant's view of the defenses asserted, nor does the court dispute the prejudice asserted in the failure to call witnesses and "the natural reluctance of Kassner to subject Hodas and Levin to a full and searching cross-examination" (id. at p.773). Rather, the New York Court of Appeals assumes the existence of the conflict but finds appellant to have waived his right to complain, an issue that will be dealt with below.

In fact, it is submitted that a review of the trial transcript herein demonstrates numerous instances of prejudice directly related to the conflict of interest.

Thus the failure to cross-examine witnesses properly because of inhibitions created by the interests of one defendant over another has been held to be prejudicial conflict of interest. Glasser v. United States, *supra*; United States v. DeBerry, *supra*; White v. United States, 396 F.2d 822 (4th Cir. 1968). So, too, where counsel's summation emphasizes the different culpability of defendants represented by the same attorney, prejudicial conflict has occurred. United States v. Olsen, 453 F.2d 612 (2d Cir. 1972) ; State v. Cox, 506 P.2d 1038 (Ariz. 1973).

In addition, the failure of one defendant to take the stand where another defendant does so, when both are represented by the same attorney, is evidence of a conflict of interest particularly where the testimony of the testifying defendant is in some ways harmful to the silent defendant. In Morgan v. United

States, 396 F.2d 110 (2d Cir. 1968), the court, in discussing the problem of a conflict of interest where two defendants are represented by the same attorney, stated:

The decision whether a defendant should testify may be unduly affected by the risk that his testimony may develop so as to disclose matters which are harmful to the other defendant or which conflict with the other defendant's story. The attorney's freedom to cross-examine one defendant on behalf of another will be restricted where the attorney represents both defendants. And if, where two defendants are represented by the same attorney, one defendant elects to take the stand and the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the stand is almost inescapable.

(at p. 114)

A review of the cases indicates that where one defendant takes the stand and the other, represented by the same counsel, does not, there is almost a presumption of prejudice. In fact, it is difficult, if not impossible, to find any case which upholds joint representation where only one defendant testifies, and holds such not to be a conflict in and of itself. See United States v. Carrigan, *supra*; United States v. DeBerry, *supra*, Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965); United States v. Foster, 469 F.2d 1 (1st Cir. 1972); White v. United States, *supra*, United States v. Gougis, 374 F.2d 758 (7th Cir. 1967). See, also, Holland v. Henderson, 460 F.2d 978 (5th Cir. 1972). On the other hand, where both defendants take the stand the court has found little problem in upholding the joint representation.

See United States v. Lovano, supra and United States v. Paz-Sierra, 367 F.2d 930 (2d Cir. 1966).

Each of the problems enumerated above was present in this case and had an impact upon the appellant's defense. Certainly, the question of appellant not taking the stand or the failure to call the witness Bayarsky are indicative of the problems presented by the same lawyer representing appellant and Hodas. If trial counsel's decision not to place appellant on the stand or not to call Bayarsky as a witness were in any way motivated by the fact that their testimony might not have helped Hodas' claim that he was only a landlord, then appellant did not have effective representation. However, one need not even speculate when assessing the damage done to appellant's defense when Hodas took the stand to exonerate himself and emphasized the motive that appellant allegedly possessed. The possible prejudice in the eyes of the jury to appellant who did not take the stand is, as the Morgan court noted, "almost inescapable."

As to the critical issue of motive, and as to critical questions of how the defense was to be conducted, appellant and Hodas did not have the same interests. The Hodas defense was effective only in comparison to the lack of defense put forth by appellant. Each time trial counsel emphasized Hodas' non-relationship or non-involvement with the massage parlor, he

strengthened the case of the People against Kaplan. Under the rationale of Glasser and DeBerry the different defenses were sufficiently diverse that no one lawyer could bridge the gap between them and effectively represent Hodas and appellant at the same time. As a result of the joint representation of appellant and Hodas by one attorney, appellant's defense suffered substantial prejudice and he was denied the effective assistance of counsel guaranteed him under the Sixth and Fourteenth Amendments.

POINT III

THE DISTRICT COURT ERRED IN NOT ACCORDING APPELLANT A FACTUAL HEARING

To the extent that the District Court determined that appellant knowingly and intentionally waived his Sixth Amendment rights to the effective assistance of counsel, a factual hearing should have been accorded appellant. The state court record was insufficient to determine whether or not appellant was "an intelligent and perceptive businessman" as alluded to by the District Court or, in fact, was a former boxer and bouncer who had a sixth grade education, as alleged by appellant. Such factual determinations are essential to evaluating whether or not appellant understood his rights to independent counsel, the risks in continuing with Kassner and Detsky and whether, notwithstanding those risks, he wanted to proceed with them as his attorneys.

As to the issue of waiver, the determination by the New York Court of Appeals was not adequately supported by the record. Further, material facts remained in dispute which necessitated an independent hearing being held by the District Court. United States ex rel Lewis v. Henderson, 520 F.2d 896 (2d Cir. 1975).

In its present form the record before this Court cannot support a finding that appellant knowingly and intelligently waived his fundamental rights to counsel.

Conclusion

Wherefore, it is respectfully requested that the decision and judgment of the District Court be reversed and that the habeas corpus petition be in all respects granted.

Respectfully submitted,

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